APPEAL NO. 050570
FILED APRIL 28, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 4, 2005, and was continued on February 3, 2005. The hearing officer resolved the disputed issues by deciding that the Independent Review Organization's (IRO) determination is not supported by a preponderance of the medical evidence and that since the appellant/cross-respondent (claimant) did not timely file his appeal of the adverse IRO determination the Texas Workers' Compensation Commission (Commission) has no further subject matter jurisdiction over the requested spinal surgery and therefore, the respondent/cross-appellant (carrier) is not liable for the spinal surgery. Both parties appeal. The claimant appeals the hearing officer's determination that he did not timely file his appeal of the adverse IRO determination. The claimant attached new information to his appeal including emergency room records dated the day of the CCH, a letter from his doctor which states that the claimant suffers from coronary heart disease and severe anxiety and gets nervous and forgetful, and a faxed copy of the IRO determination that the claimant faxed to an attorney he has employed to represent him in connection with an automobile accident. The carrier responded to the claimant's appeal, urging affirmance of the determination that the claimant failed to timely file his appeal of the adverse IRO determination. Additionally, the carrier objects to the consideration on appeal of the new evidence included in the claimant's appeal. The carrier also filed an appeal, disputing the determination that the IRO determination is not supported by a preponderance of the medical evidence. The appeal file does not include a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

This case was originally scheduled for a CCH on October 29, 2004. The claimant appeared and was assisted by an ombudsman but the carrier failed to appear. However, due to the unavailability of a witness, the claimant requested a continuance and it was granted. This matter was then rescheduled to January 4, 2005. The claimant appeared along with the assistance of another ombudsman and the carrier appeared being represented by its attorney. At the January 4, 2005, hearing, the carrier's attorney made a motion to dismiss for lack of jurisdiction alleging that the claimant failed to timely file a request for an appeal of the IRO determination. The carrier's motion was denied and the matter was reset to be heard on February 3, 2005. The issue to be resolved at the February 3, 2005, CCH was stated as follows: "Is the IRO determination supported by a preponderance of the evidence?" The hearing officer stated that since the issue of whether or not the claimant timely filed an appeal of the IRO determination may be jurisdictional, she would hear evidence on that issue. The hearing officer made specific findings regarding the timeliness of the claimant's appeal of the IRO determination in her decision and order.

NEW EVIDENCE

The claimant attached new information to his appeal, including medical records dated the day of the CCH, and a copy of the IRO determination that the claimant alleges he faxed to an attorney representing him in an automobile accident, which evidences a receipt date of October 8, 2004. In his appeal, the claimant contends that he received a copy of the IRO determination only after he requested a copy from the carrier and further that he received the IRO determination a day or 2 before October 7, 2004. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See* generally, Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W. 2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the attached copy of the IRO determination and explanation provided by the claimant regarding his receipt of the IRO determination is evidence which meets the requirements of newly discovered evidence, in that the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered. Nor do we agree that the fact that the claimant needed medical attention after he attended the CCH requires a remand. The claimant gave no indication that he was uncomfortable during the CCH nor did he request a recess or a continuance.

TIMELY FILING

The IRO decision was dated September 15, 2004, and reflects that the claimant's treating doctor, (Dr. S) was the requestor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(p)(3) (Rule 133.308(p)(3)) provides that the notification in a prospective necessity dispute must be delivered to the parties not later than the 20th day after the IRO receipt of the dispute. The IRO determination further reflects that a copy was sent to Dr. S, the carrier, and the Commission. However, there is no indication that a copy was sent to the claimant. The claimant's testimony regarding the date he received notice of the IRO determination was somewhat contradictory. The claimant testified at one point that he received the IRO determination prior to seeing Dr. S on October 7, 2004, and also testified that he learned of the IRO determination from Dr. S. However, as noted by the hearing officer no definite date was established as to exactly when the claimant received the IRO determination. The hearing officer additionally noted that it is unclear as to when, if at all, the Commission mailed any copies of the IRO to the parties. Various entries from the Dispute Resolution Information System (DRIS) regarding the disputed issue were in evidence. There was a DRIS entry which reflected

that the Commission received the IRO determination on September 17, 2004. Additionally, a DRIS note reflects that when the claimant came to the (City) field office of the Commission on October 8, 2004, to make inquiries, that he had a copy of the IRO determination. The evidence reflects that the claimant filed his appeal of the IRO determination with the Commission on October 11, 2004. Rule 133.308(v) provides:

> Spinal Surgery Appeal. A party to a prospective necessity dispute regarding spinal surgery may appeal the IRO decision by requesting a [CCH].
>
> The written appeal must be filed with the commission Chief Clerk of Proceedings, Division of Hearings, within 10 days after receipt of the IRO decision and must be filed in compliance with § 142.5(c) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes).

The hearing officer noted in her discussion that she concluded that the claimant received the IRO determination from the Commission no later than September 23, 2004, "assuming a mail-out date of September 18, 2004," and applying the deemed receipt rule of 5 days. However, there was no evidence that the Commission sent the IRO determination to the claimant on September 18, 2004. Further, the certificate of service of the IRO reflects that a copy of the IRO was sent to the carrier and the requestor *or* claimant [emphasis added]. As previously noted, Dr. S was the requestor and the fax cover sheet attached to the IRO reflects that a copy of the determination was sent to Dr. S, the carrier, and the Commission, but does not reflect that it was sent to the claimant. It was error for the hearing officer to determine that the claimant did not timely appeal the IRO determination because she determined the date the claimant received the IRO determination by assuming that the Commission mailed the IRO determination to the claimant when there was no evidence to indicate that the Commission mailed the IRO determination to the claimant on that date or any other date. The hearing officer then applied the deemed receipt rule to determine the date of receipt by the claimant of the IRO determination. This was error.

We remand this case back to the hearing officer to make a determination on the date of receipt of the IRO determination by the claimant. The hearing officer may on remand, at her discretion, hold a hearing on remand or allow the parties to submit and respond to written materials.

We reverse the determinations that the claimant did not timely request his appeal of the IRO determination; therefore, the Commission has no jurisdiction in this subject matter; and that therefore, carrier is not liable for the spinal surgery; and remand the issue of whether the claimant timely requested his appeal of the IRO determination back to the hearing officer for further proceedings consistent with this decision.

THE IRO DECISION

The issue at the CCH was whether the IRO's decision is supported by a preponderance of the evidence. Rule 133.308(w) provides that in all appeals from review of prospective or retrospective necessity disputes, the IRO decision has presumptive weight. In Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002, the Appeals Panel held that the presumptive weight provision in Rule 133.308(v) (now Rule 133.308(w)) is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption; that the IRO decision is the decision which should be adopted, unless rebutted by contrary evidence; and that the hearing officer in that case did not err in applying a preponderance of the evidence standard in determining that the IRO decision was not supported by the evidence. The Appeals Panel has held that whether an IRO decision is supported by a preponderance of the evidence involves a fact issue for the hearing officer to resolve as the sole judge of the weight and credibility of the evidence. Texas Workers' Compensation Commission Appeal No. 032359, decided October 21, 2003.

The hearing officer did not err in concluding that the IRO's decision and order is not supported by a preponderance of the evidence. The parties stipulated that the claimant sustained a compensable spinal injury on _____. On more than one occasion a request was made by the claimant's doctor to perform spinal surgery. The carrier disputed the recommendation for spinal surgery. The Commission assigned this case to an IRO. The IRO agreed with the adverse determination of the carrier to deny the requested lumbar surgery. The claimant's doctor testified at the CCH and the hearing officer was persuaded that Dr. S presented "a compelling argument as to why a preponderance of the credible medical evidence supports a finding that the requested spinal surgery should be approved."

There is conflicting medical evidence on the disputed issue. In the instant case, the hearing officer determined that the IRO's decision is not supported by a preponderance of the evidence. The issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the determination that the IRO's decision is not supported by a preponderance of the evidence. We reverse the hearing officer's determinations that the claimant did not timely request his appeal of the IRO determination; therefore, the Commission has no jurisdiction in this subject matter; and that therefore, carrier is not liable for the spinal surgery; and remand the issue of whether the claimant timely

requested his appeal of the IRO determination back to the hearing officer for further proceedings consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge